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8  
9 UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

10 United States of America,

11  
12 Plaintiff,

13 v.

14 Edward Kraemer & Sons, Inc.

15  
16 Defendant.

**COMPLAINT**

17 The United States of America, acting at the request of the Administrator of the United  
18 States Environmental Protection Agency ("EPA"), alleges as follows:

19 **INTRODUCTION**

20 1. This is a civil action brought pursuant to Section 113(b)(1) of the Clean Air Act (the  
21 "Act"), 42 U.S.C. § 7413 (b)(1), for injunctive relief and the assessment of civil penalties against  
22 Edward Kraemer & Sons Inc. for violations of the Act and the federally approved Arizona State  
23 Implementation Plan.

24 2. Authority to bring this action is vested in the United States Department of Justice  
25 pursuant to 28 U.S.C. §§ 516 and 519, and 42 U.S.C. § 7605.

26 3. Notice of the commencement of this action has been given to the State of Arizona  
27 as required by § 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1).  
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1 in the ambient air as PM 10 (particulate matter particles with an aerodynamic diameter less than  
2 or equal to a nominal of 10 micrometers). 52 Fed. Reg. 24663 (codified at 40 C.F.R. § 50.6).

3 11. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), EPA promulgated lists  
4 of attainment status designations for each air quality control region ("AQCR") in every state.  
5 These lists identify the NAAQS attainment status of each AQCR for each of the criteria  
6 pollutants. In order to implement, maintain and enforce the NAAQS for these criteria pollutants,  
7 Section 110 requires each state to adopt a State Implementation Plan ("SIP") for each AQCR (or  
8 portion thereof) within the state. The state is required to submit the SIP to EPA for approval.  
9 42 U.S.C. § 7410.

10 12. Rule 2 of Regulation 1 and Rule 310 of Regulation 3 of the Maricopa County Air  
11 Quality Department ("MCAQD") regulations are part of the federally approved and federally-  
12 enforceable SIP that the State of Arizona submitted to the EPA pursuant to Section 110 of the  
13 Act, 42 U.S.C. § 7410. *See*, 47 Fed. Reg. 26,382 (June 18, 1982), 62 Fed. Reg. 41,856 (Aug.  
14 4, 1997), and 67 Fed. Reg. 48,718 (July 25, 2002).

15 13. The Projects are located in Phoenix, Maricopa County, within the jurisdiction of  
16 MCAQD. Maricopa County has been designated as a serious non-attainment area for the  
17 NAAQS for PM 10. *See*, 40 C.F.R. § 81.303.

18 14. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the commencement of  
19 an action for civil penalties and injunctive relief for violations of the federally enforceable SIP.  
20 Under Sections 113 (b) of the Act, 42 U.S.C. § 7413(b); the Federal Civil Penalties Inflation  
21 Adjustment Act of 1990, Pub.L.No. 101-410, 104 Stat. 890 (1990), amended by Pub. L. No. 104-  
22 134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69, 360  
23 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of  
24 Federal Regulations (CFR) Part 19, Kraemer is liable for a civil penalty of up to \$27,500 per day  
25 for each violation of MCAQD Rule 310 occurring on or after January 31, 1997 but on or before  
26 March 15, 2004, and a civil penalty of up to \$32,500 per day for each violation of MCAQD Rule  
27 310 occurring after March 15, 2004.

1 FACTUAL ALLEGATIONS

2 15. Maricopa County, which includes Phoenix, Arizona, is a designated serious non-  
3 attainment area for the NAAQS for PM10. A significant contributor of such particulate matter  
4 in Maricopa County is construction sites and other areas in which the naturally stabilized desert  
5 surface has been disturbed. Phoenix is among the fastest growing cities in the nation, and rapid  
6 urban growth has resulted in a sustained astronomical rate of new construction in the city and  
7 a commensurate increase in the amount of particulate matter. The MCAQD has promulgated  
8 Regulation 3, Rule 310 (fugitive dust sources) to control such emissions and Regulation 2, Rule  
9 200, § 305, which requires an earthmoving permit for all dust-generating activities including  
10 earthmoving.

11 16. Kraemer engages in roadway construction projects and other construction projects  
12 (individually the "Project"; collectively the "Projects") throughout Phoenix, Arizona. At all  
13 times relevant to this litigation, Kraemer engaged in such Projects at the following locations in  
14 Phoenix, Arizona: (1) a portion of the Wickenburg-Phoenix Highway along Grand Avenue  
15 located between 43rd Avenue and 51st Avenue (east-west) and between Bethany Home Road  
16 and Camelback Road (north-south); (2) roadway construction near the intersection of 55th  
17 Avenue and Maryland Avenue; (3) roadway construction near the intersection of 99th Avenue  
18 and Bethany Home Road; and (4) a portion of the San Tan Freeway between Alma School Road  
19 and Dobson Road (east-west) and Pecos and Willis Road (north-south).

20 17. At the Projects, Kraemer engaged in activities which involved importation, export,  
21 excavation and/or storage of sand, soil, gravel and other bulk materials by means of large trucks  
22 or other vehicles. Sand, soil, or gravel all constitute bulk materials under Rule 310.

23 18. Between May 2003 and January 2005, MCAQD issued a total of seventeen Notices  
24 of Violations ("NOV") for violations of Regulation 3, Rule 310 of the MCAQD Air Pollution  
25 Control Regulations. During this time, MCAQD inspected the four projects listed in paragraph  
26 16 above and determined them to be "dust-generating" and "earthmoving" operations as defined  
27 in Sections 200 and 210 of MCAQD Rule 310.

1           19. On May 6, 2003, MCAQD inspected the project at Grand Avenue and determined  
2 it to be an "earthmoving" and "dust-generating" operation subject to MCAQD Rule 310. On the  
3 same day, MCAQD issued two NOV's for failure to install a suitable device to control or prevent  
4 trackout and failure to immediately cleanup trackout exceeding 50 linear feet as Rule 310  
5 requires.

6           20. On May 14, 2003, MCAQD inspected the project at Grand Avenue and issued an  
7 NOV for failure to immediately clean up trackout exceeding 50 linear feet.

8           21. On October 1, 2003, MCAQD inspected the Project at 55th Avenue and Maryland  
9 Avenue and issued an NOV for failure to install a suitable trackout control device at all exits to  
10 the project.

11           22. On January 9, 2004, March 3, 2004, March 10, 2004, June 23, 2004, and June 29,  
12 2004, MCAQD conducted inspections at the Projects at Grand Avenue, 99th and Bethany Home,  
13 and San Tan Freeway and documented ten violations of MCAQD Rule 310 including the  
14 following: a) failure to install a suitable trackout control device; b) failure to immediately  
15 cleanup trackouts exceeding 50 linear feet; c) failure to implement approved dust control  
16 measures; and d) failure to operate a water application system while conducting earthmoving on  
17 a disturbed surface of 1 acre or larger. MCAQD issued NOV's for ten violations.

18           23. On December 10, 2004, the EPA issued its Finding and Notice of Violation pursuant  
19 to § 113 (a)(1) of the Act, 42 U.S.C. § 7413, finding the violations described in paragraphs 19 -  
20 22 above.

21           24. On January 28 and 31, 2005, MCAQD inspected the Project at the San Tan Freeway  
22 and documented three violations including a failure to install a suitable trackout control device  
23 and failure to immediately clean up trackout exceeding 50 linear feet. Three NOV's were issued  
24 for these violations.

25           25. On March 28, 2005, EPA issued its Finding and Notice of Violation pursuant to  
26 § 113(a)(1) of the Act, 12 U.S.C. § 7413, finding the violations described in paragraph 24 above.

1       26. Plaintiff is informed and believes that unless enjoined by this Court pursuant to the  
2 provisions of § 113(b) of the Act, 42 U.S.C. § 7413(b), Kraemer will continue to violate the  
3 requirements and provisions of MCAQD Rule 310 in the manner alleged herein.

4                                   **COUNT ONE**  
5                                   **(Failure to Install Suitable Trackout Control Devices)**

6       27. Paragraphs 1 through 26 are incorporated herein by reference as though fully set  
7 forth below.

8       28. At least since May 2003, Kraemer has engaged in transportation of bulk materials  
9 to and from the Projects in that the Projects frequently import and export topsoil by means of  
10 large trucks or other vehicles in connection with excavation and grading operations. Sand, soil  
11 or gravel all constitute "bulk materials" as defined by MCAQD Rule 310. MCAQD inspections  
12 in 2003-2005 all indicated that haul trucks frequently create trackout at the entrances to the  
13 Projects as well as paved public roadways leading to and from the Projects. Kraemer is thus an  
14 owner and operator of a source engaged in spillage, carry-out, and/or trackout activities. The  
15 same inspections and the dust control permits issued by MCAQD also established that the  
16 Projects contained disturbed surface areas of five acres or larger.

17       29. As a result, § 308.3(a)(1) of MCAQD Rule 310 required Kraemer to install a  
18 suitable trackout control device to control and prevent trackout and/or remove particulate matter  
19 from the exterior surfaces of motor vehicles traversing the Projects. A gravel pad (at least 30  
20 feet wide, 50 feet long, and 6 inches deep), grizzly, or a paved road (starting from the point of  
21 intersection with a paved public roadway and extending for a centerline distance of at least 100  
22 feet and a width of at least 20 feet) would all have satisfied this requirement.

23       30. All inspections performed by MCAQD on May 6 and October 1, 2003, March 3 and  
24 10, June 23 and 29, 2004 and January 28 and 31, 2005 showed that Kraemer failed to install  
25 suitable trackout control measures at entrances to the Projects in violation of MCAQD Rule 310  
26 and the federally approved and federally-enforceable SIP for the State of Arizona. The  
27 violations of § 308.3(a)(1) of MCAQD Rule 310 occurred on May 6 and October 1, 2003, March  
28 3 and 10, June 23 and 29, 2004 and January 28 and 31, 2005.

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**COUNT TWO**  
**(Failure to Immediately Clean Up Trackout)**

31. Paragraphs 1 through 26 are incorporated herein by reference as though fully set forth below.

32. At least since May, 2003, Kraemer has engaged in “dust-generating” and “earthmoving” operations as defined in §§ 200 and 210 of MCAQD Rule 310. MCAQD inspections in 2003, 2004 and 2005 indicated not only that trackout existed, but also that Kraemer failed to immediately clean up trackout created by their haul trucks. Section 308.3(b) of MCAQD Rule 310 requires that owners or operators like Kraemer, who engage in spillage, carryout and/or trackout activities to immediately clean up such trackout extending 50 linear feet or more.

33. During their inspections of the Projects on May 6 and 14, 2003, January 9, March 10, and June 23, 2004, and January 28, 2005, the MCAQD inspectors observed and measured trackout near the entrances to the Projects that extended at least 50 linear feet. They also observed that Kraemer failed to immediately cleanup the trackout. In fact it remained uncleaned at the end of each inspection which typically lasted one to two hours and as long as six hours on one occasion. Thus on May 6 and 14, 2003, January 9, March 10, and June 23, 2004, and January 28, 2005, Kraemer violated § 308.3(b)(1) of MCAQD Rule 310 and the federally approved and federally enforceable SIP for the State of Arizona.

**COUNT THREE**  
**(Failure to Operate Water Application System)**

34. Paragraphs 1 through 26 are incorporated herein by reference as though fully set forth below.

35. At least since May, 2003, Kraemer has engaged in “dust-generating” and “earthmoving” operations as defined in §§ 200 and 210 of MCAQD Rule 310. Additionally, Kraemer has engaged in the transportation of bulk materials to and from the Projects, in that the Projects frequently import and export topsoil by means of large trucks or other vehicles in

1 connection with excavation and grading operations. Sand, soil or gravel all constitute "bulk  
2 materials" as defined by MCAQD Rule 310.

3 36. On June 29, 2004, at the Grand Avenue Project an MCAQD inspector observed that  
4 Kraemer failed to operate a water application system (e.g., a water truck) while conducting  
5 earthmoving operations on a disturbed surface area one acre or larger despite the fact that water  
6 had been chosen as the primary control measure in its dust control plan for the Project. Thus,  
7 on June 29, 2004, Kraemer violated Section 308.7 of MCAQD Rule 310 and the federally  
8 approved and federally enforceable SIP for the State of Arizona.

9 **COUNT FOUR**  
10 **(Failure to Comply With Dust Control Plan)**

11 37. Paragraphs 1 through 26 are incorporated herein by reference as though fully set  
12 forth below

13 38. At least since May, 2003, Kraemer has engaged in "dust-generating" and  
14 "earthmoving" operations as defined in §§ 200 and 210 of MCAQD Rule 310. Additionally, at  
15 least since May, 2003, Kraemer has engaged in the transportation of bulk materials to and from  
16 the Projects, in that the Projects frequently import and export topsoil by means of large trucks  
17 or other vehicles in connection with excavation and grading operations. Sand, soil or gravel all  
18 constitute "bulk materials" as defined by MCAQD Rule 310.

19 39. On March 10, 2004, an MCQAD inspector at the Grand Avenue Project observed  
20 that Kraemer failed to implement any approved control measure while conducting a dust-  
21 generating activity. The inspector specifically observed a track hoe excavating and loading dirt  
22 onto trucks at the site without watering for over two hours. The approved dust control plan for  
23 the Grand Avenue Project required the use of a water truck during such a dust-generating  
24 activity as a primary control measure; cessation of operations was identified as a contingency  
25 control measure in the plan. Kraemer did neither. Thus on March 10, 2004, Kraemer violated  
26 Section 306 of MCAQD Rule 310 and the federally approved and federally enforceable SIP for  
27 the State of Arizona.  
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1 **PRAYER FOR RELIEF**

2 WHEREFORE, the United States of America respectfully requests that it be awarded  
3 the following relief against Kraemer:

4 A. Issuance of an injunctive order requiring that Kraemer comply with the requirements  
5 of Regulation 3, Rule 310 of the MCAQD regulations.

6 B. Assessment of a civil penalty of up to Twenty Seven Thousand Five Hundred  
7 Dollars (\$27,500.00) per day for each violation of MCAQD Rule 310 occurring on or after  
8 January 31, 1997, but on or before March 15, 2004, and a civil penalty of up to Thirty-Two  
9 Thousand Five Hundred Dollars (\$32,500.00) per day for each violation of MCAQD Rule 310  
10 occurring after March 15, 2004.

11 C. Such other and further relief as this Court may deem appropriate.

12 Respectfully submitted this \_\_\_\_ day of November, 2005.

13 PAUL K. CHARLTON  
14 United States Attorney  
15 District of Arizona

16  
17 SUE A. KLEIN  
18 Assistant U.S. Attorney

19 OF COUNSEL:

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1 I hereby certify that on November \_\_, 2005, I electronically transmitted the attached  
2 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice  
3 of Electronic Filing to the following CM/ECF registrants:

4 Richard Tobin  
5 LEWIS & ROCA, LLP  
6 40 N. Central Avenue  
Phoenix, AZ 85004-4429

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